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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 417

JOE T. CAWTHORN,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

Petitioner, Joe T. Cawthorn, respectfully prays that a rehearing be granted of his petition for a writ of certiorari in this cause and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming a judgment of conviction entered against the petitioner, and others, by the United States District Court for the Eastern District of Louisiana after a verdict by a jury (2168-71).

Jurisdiction

Rule 33, subdivision 2, of the rules of this court provides for the filing of a petition for rehearing of orders on petitions for writs of certiorari. The petition for a writ of certiorari herein was denied on January 9, 1950. By order dated January 21, 1950, this court extended petitioner's time to file a petition for rehearing to February 23, 1950.

Brief Statement of Grounds

This petition for rehearing is confined to substantial grounds available to petitioner although not previously presented. Those grounds are as follows:

a) That petitioner has been deprived of his liberty without due process of law in contravention of the Fifth Amendment to the United States Constitution.

b) That petitioner has been deprived of his right to trial by an impartial jury in contravention of the Sixth Amendment to the United States Constitution.

I

The petitioner was deprived of a trial by twelve jurors with a "mental attitude of appropriate indifference" as required by the United States Constitution (*United States* v. *Wood*, 299 U. S. 123, 146).

A brief consideration of the total effect created by the setting in which this case was tried and the serious errors committed by the trial court will demonstrate how the jury was compelled to surrender its true function as an impartial fact-finding body to become the mere instrumentality for rendering a verdict of conviction.

II

Originally the Government instituted a criminal tax prosecution against one William T. Burton. After two trial juries had disagreed, the Government indicted the petitioner, one of the attorneys who had represented Burton at his first tax trial. The indictment named as co-defendants James A. Noe, a former Governor of the State of Louisiana, one Marcel F. LaBranche, who had been a juror at the second Burton tax trial, and Burton himself.

The defendants were charged with conspiring to tamper with the juror LaBranche.

It did not take very long for certain extraneous, highly prejudicial matters to become very clear to the jury which was considering the case against this petitioner and his co-defendants. Judge Wayne G. Borah had presided at both of the Burton tax trials. He also presided at the trial of the case below. The prosecutor, with studied deliberation, elicited from one of his witnesses the following testimony:

> "Q. • • • Now Mr. Walmsley, will you please tell the jury how it happened that you discussed this case with agent Malone? A. You mean originally?
>
> Q. Originally? A. Mr. Malone came over to my office and said that he was a federal agent and that Judge Borah was asking him to go into the matter pertaining to the jury trial, and he wanted to ask me for some information pertaining to same • • •.
>
> Q. When you testified and you mentioned Judge Borah's name, did this agent say anything about an investigation being conducted by the Court, or anything like that? A. No, at the request of the Court. • • • •" (536).

On cross-examination, the witness recalled Malone's words as follows:

> "'I am here to make an investigation at the request of Judge Borah'" (542).

The testimony that Judge Borah had been responsible for instigating the investigation which resulted in the indictment and trial of the petitioner and his co-defendants was delivered in the presence of both Judge Borah and Mr. Malone, a Treasury agent. Malone did not take the stand to either deny or affirm it.

It is quite evident that Judge Borah either did or did not instigate the investigation. However, even if the judge had nothing whatever to do with starting an investigation of the second Burton trial jury, a Government witness was

permitted to create the harmful, and highly prejudicial, impression that he had. The trial judge permitted himself, in effect, to be presented to the jury below as having departed completely from the "attitude of unswerving impartiality" required of him by fundamental law (*Hunter* v. *United States,* 62 F. 2d 217, 220 [5th Cir., 1932]). The prosecutor deliberately created that impression and a Treasury agent sat by, adding credence, by his silence, to the witness' assertion.

The trial judge's "lightest word or intimation" is received by the jury with great deference and indeed "may prove controlling" (*Quercia* v. *United States,* 289 U. S. 466, 470), making it a "fundamental and essential rule of especial importance in criminal cases" that he avoid the "appearance of becoming the advocate of either one side or the other" (*Adler* v. *United States,* 182 Fed. 464, 472 [5th Cir., 1910]).

In *Gomila et al.* v. *United States,* 146 F. 2d 372, 373-4 (5th Cir., 1944), the court held:

> "A fair and impartial trial is guaranteed to every defendant, and fundamentally means a trial before an impartial judge and by an impartial jury. • • • [T]he court should be careful to preserve an attitude of impartiality and guard against giving the jury any impression that the court was of the opinion that defendant was guilty."

III

A juror was on trial, along with others, charged with having corrupted his oath and having sold out to the defendant in a criminal case. LaBranche stood before these jurors accused of a heinous crime because his alleged conduct as a juror at a previous trial apparently had caused the active intervention of the very judge who now presided at this trial. The judge's intervention could have conveyed to this jury only one impression, namely, his belief that the disagreement at Burton's second tax trial resulted

from the corruption of one or more members of the Burton tax jury by the defendant in that case or by his representatives. The jurors in this case could regard the judge therefore as nothing but a partisan, an advocate of one side of the controversy.

The serious errors of law committed by the trial court, which we are about to discuss, could not have failed to remove the last shred of "appropriate indifference" which this jury might have retained after the startling revelation that the judge sitting on the bench was responsible for the instigation of the investigation conducted by agents of the United States Treasury Department.

IV

The Government produced Leon Adams, one of LaBranche's fellow jurors, who testified on direct examination, in answer to a question put to him by the prosecutor, that LaBranche had voted for acquittal throughout the jury's deliberations in the second Burton tax trial (545). When counsel for the defendants sought to inquire how the other jurors stood (545-56), in order to establish that seven other jurors also voted for acquittal (2276), the trial court cut off the inquiry (552) and prevented the true and complete picture of the Burton tax trial jury's deliberations from being presented to this jury although the Government had tendered the issue and had presented a false, because distorted, view.

Chief Judge Hutcheson in the Court of Appeals below, dissenting from the refusal of that court to grant petitioner's application for a rehearing, characterized the trial court's ruling as follows:

> "This was highly prejudicial to defendants because by the limitation put on the cross-examination, the evidence of the government as to how LaBranche had voted was given great and peculiar significance and made perhaps to have overwhelming weight in the decision of the case.

> The *Clark* case [*Clark* v. *United States*, 289 U. S. 1], on which the court below relied, and on which our opinion was rested, does not support the ruling of the District Judge. It is to the contrary effect. • • • Here, under the *Clark* case, *supra*, it was certainly proper to inquire how LaBranche voted. But it was certainly equally proper for defendants, on cross-examination, to prove, as bearing on the inquiry, how the other jurors voted" (2276).

The conduct of the trial court was condemned by Chief Judge Hutcheson in the following language:

> "Indeed, to permit the government, as was done here, to offer a witness and then to deny defendant reasonable cross-examination of that witness is contrary to common fairness as understood by every standard of American justice and due process of law" (2277).

Judge Hutcheson was considering the effect of this ruling, just as we did in our original petition, as an isolated error in the exclusion of evidence which occurred in the course of a fairly lengthy trial. As we have demonstrated in this petition for rehearing, it was not only that but a great deal more. It was indeed another step in that combination of closely related circumstances which deprived this petitioner of his constitutional right to a fair and impartial trial.

For Judge Borah's ruling that the defendants could not prove by cross-examination how the other jurors stood was separated in point of time only by a recess for luncheon (543-4) from the revelation that Judge Borah had instigated the investigation of the Burton jury. The impact of this ruling and the preceding revelation on the jurors who heard the testimony of the witness Adams and pondered the implications which these events might hold for themselves, is not difficult to ascertain. If one of us votes for acquittal, these jurors could not help but reason, our vote may be the subject of an investigation ordered by the trial judge sitting up there; innocent though we may be, our vote may be proven as an important element of a

false accusation against us in a prosecution for jury tampering and we will not be permitted to defend ourselves by proving that other jurors were of the same mind, were affected by the evidence the same way that we were and voted the same way that we did. In this manner were the jurors who stood for acquittal effectively cut off from one another; a juror who might entertain a reasonable doubt concerning the guilt of the petitioner thus was completely isolated from a fellow juror who might share his opinion.

V

"Impartiality is not a technical conception. It is a state of mind" (*United States* v. *Wood,* 299 U. S. 123, 145).

The case against the petitioner went to the jury on the flimsiest basis imaginable. At the time fixed by the Government's main witness for the occurrence of two of the most crucial conversations relating to the alleged conspiracy, the petitioner, by overwhelming, uncontradicted testimony, proved that he was hundreds of miles from the alleged scene (see petition for writ of certiorari, pp. 9-12).

Another important witness for the Government—Astorias—did not even mention the petitioner's name, aside from stating that he knew him. A third witness for the Government—Walmsley—described a conversation with both the defendant Noe and the petitioner, asserting that both of them, he couldn't tell which, had made certain incriminating statements and assertions. The acquittal of the defendant Noe indicates that Walmsley's story was rejected by the jury.*

These facts are pertinent here only insofar as they tend to explain why the jury, at the end of twenty-five hours of deliberation, had failed to reach a verdict. One or

* For a more detailed discussion of the lack of credible evidence against the petitioner Cawthorn see the petition for a writ of certiorari, pages 9-17, inclusive.

more of the jurors must have entertained a reasonable doubt concerning the guilt of one or more of the defendants, despite the seriously prejudicial atmosphere in which the case had been tried. The innocence of the petitioner, although perhaps in itself no ground for the issuance of a writ of certiorari, was certainly well established on the record. A reasonable doubt concerning his guilt is the only conclusion a jury with a "mental attitude of appropriate indifference" could have drawn from this record.

At this stage of the proceedings the jury was called back by the trial judge and given supplemental instructions (1453) which Judge Borah announced (1454) had been approved by this court in the case of *Allen* v. *United States,* 164 U. S. 492. In the course of that charge the jury was instructed, among other things, that "if much the larger number" of the panel were for conviction a dissenting juror

> "should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath" (1455).

In this charge the trial judge also advised dissenting jurors, if the majority were holding out for acquittal, to consider whether they ought not to doubt the correctness of their judgment which failed to carry conviction to the minds of their fellow jurors (1455).

The coercive effect of this charge in this particular setting is obvious. A member of the minority of the jury holding out for *conviction* would understand very well, from the circumstances of this case, that continuing to vote for conviction could not possibly arouse the hostility of the Government or suspicion concerning his motives and could not possibly lead to an investigation of his conduct instigated by the trial judge. On the other hand, a juror in the minority voting for *acquittal* could clearly foresee the sus-

picion and the hostility aroused in the minds of not only the prosecutor and the Treasury agents, but of the judge himself, who had been presented to them as having instigated the previous jury investigation. Thus the supplemental charge in this setting could be effective only upon those members of the jury who entertained a reasonable doubt concerning the guilt of the defendants.

Furthermore, by the supplemental charge, a juror who found himself among the minority voting for acquittal, was instructed that the majority of his fellow jurors who persisted in voting to convict

1) were equally honest with himself;

2) were equally intelligent with himself;

3) had heard the same evidence

   (a) with the same attention

   (b) with an equal desire to arrive at the truth

   (c) under sanction of the same oath.

The trial court voiced these unproven assumptions without any basis whatever for doing so and without any effort to substantiate them. While all of the jurors may have been equally honest and under the sanction of the same oath, the *Allen* case to the contrary notwithstanding, there was no proof that the jurors were equally intelligent, or that they had heard the evidence with the same attention,* or, what is most important, that they had heard the evidence with an equal desire to arrive at the truth.

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* Ram in "A TREATISE ON FACTS" (1870) states at p. 288 ff.:

> "On the jury assembled it will always be found, that one man hears better than another, has a quicker apprehension of what a witness says, understands it more readily, has a better memory, is less subject to absence of mind, keeps his mind more attentive to what is going on, wandering neither from habit, nor from any accidental noise or other chance incident in court. The superiority of one man implies the inferiority of another in these respects."

As we have already pointed out, the desire of some of these jurors "to arrive at the truth" had been seriously impaired, if not completely destroyed, by the revelation that Judge Borah had instigated the investigation which led to LaBranche's indictment and trial and by the manner in which the evidence concerning LaBranche's vote in the second Burton tax trial was adduced. To present a majority voting for conviction to the balance of the jury as sharing an equal desire "to arrive at the truth", at a time when they probably were concerned with nothing but a desire to convict and go home in order to avoid investigation by the court, did justice neither to the defendants nor to the facts.

Moreover, this unwarranted encomium of the attributes and qualities of the jurors who constituted a majority voting for conviction was followed by a laconic statement in which the trial court purported to be instructing a hypothetical minority holding out for conviction on their duty with regard to the majority standing for acquittal. Here no reference was made to the *honesty* of the majority voting for acquittal, no mention of their *intelligence,* no mention of the fact that they too were *attentive* to the evidence and had an equal desire to arrive at the *truth*—merely the terse admonition that a minority voting for conviction ought to ask themselves "whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows" (1455).

In *Burton* v. *United States,* 196 U. S. 283, this court held that it was improper for the trial judge to couple the so-called *Allen* instructions with an inquiry directed to the jury concerning how they were divided numerically. To assume, however, that the only way a trial judge can ascertain how the jury stands in a criminal case is by direct inquiry of the panel, represents an utterly unrealistic approach to the problem. Any one with experience in the

trial of a criminal case knows that there are other ways of learning how a jury stands.* We do not know, and make no contention concerning, what occurred in this particular case. However, since information regarding how a jury stands may come to the trial judge (and an appellate court usually is not in a position to determine whether or not such information has been received) to entrust a trial court with any discretion at all in suggesting to the jurors that a minority standing either way might serve the ends of justice better by voting just the opposite, may make a complete mockery of the requirement that a defendant be accorded a fair and impartial trial.

Even if this court is not prepared to take an extreme position condemning the use of the *Allen* instructions in all criminal trials, it must be apparent that under the circumstances of this trial, regardless of whether the trial judge knew how this jury stood, the use of those instructions deprived this petitioner of his constitutional right to have his case judged on the merits by a jury which enjoyed a "mental attitude of appropriate indifference". If a mob clamoring for conviction had surrounded the courtroom, the "mental attitude" of these jurors could not have been very different. The cold fact that a conviction

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*In "YANKEE LAWYER, THE AUTOBIOGRAPHY OF EPHRAIM TUTT", the author, describing his experiences as a prosecutor in a case in the New York criminal courts, states (p. 99 ff.):

> "When the jury retired I followed them out into the corridor upon which their consultation room opened. Captain Gallagher, the court officer who had them in charge, was by this time an old friend of mine and, because I said I was tired, he brought me a chair and, having locked the door of the jury room, returned to court leaving me alone. Raucous sounds accompanied by a thin blue cloud drifted through the transom above. Placing the chair against the jamb of the door I was just able by standing on its back to peer through. Most of the jurymen had removed their coats and were sitting with their feet on the battered oak table shouting angrily at one another. I stood balancing myself on that chair back for nearly an hour. I do not pretend to record all that I heard, but only the more succulent fragments of ratiocination that stuck in my mind."

would be to the best interests of every juror who voted in the case was brought home by subtle as well as obvious methods. As they debated the issues of this case, the jurors could not fail to have uppermost in their minds not the question of whether the petitioner was guilty beyond a reasonable doubt, but the question of how their individual votes would affect their own future lives in the community in which the case was tried and in which they lived and worked.

It would take a courageous juror indeed to face, and overcome, this peril. That this jury failed to do so is no criticism of the jury system. It is a grave criticism, however, of a legal system which is content to voice such noble sentiments as "There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled" (*Baker* v. *Hudspeth*, 129 F. 2d 779, 781 [10th Cir., 1942]), while denying to this petitioner rights so eloquently proclaimed.

Apparently, only this court can infuse life into these fundamental principles. That the record of this case reveals such grave doubts concerning the guilt of the man who petitions this court for review adds a compelling note to a sacred obligation.

Wherefore, it is respectfully prayed that this petition for rehearing be granted and that the original petition be reconsidered and that a writ of certiorari be granted to bring before this court the divided decision and the judgment of the United States Court of Appeals for the Fifth Circuit.

February, 1950.

Lloyd Paul Stryker,
Attorney for Petitioner.

Harold W. Wolfram,
of Counsel.

Certificate

Counsel for petitioner certifies that this petition for rehearing is presented in good faith and not for delay and that the petition is restricted to substantial grounds available to petitioner, although not previously presented, one of the grounds specified in Rule 33, subdivision 2, of the Rules of this court.

LLOYD PAUL STRYKER,
Attorney for Petitioner.